Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands	)	WT Docket No. 03-66 RM-10586
	)	
Part 1 of the Commission's Rules – Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
	)	
Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico	)	WT Docket No. 02-68 RM-9178
	)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230

To: The Commission

REPLY COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH WIRELESS CABLE, INC. and SOUTH FLORIDA TELEVISION, INC.

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Summary of Reply Comments

BellSouth Corporation and its wholly-owned subsidiaries BellSouth Wireless Cable, Inc. and South Florida Television, Inc. (collectively, "BellSouth") urge the Commission to amend its rules consistent with its objective of making the BRS/EBS industry a robust competitor in providing advanced wireless services.

First, as BellSouth and numerous others advocated in their Comments, the Commission should adopt a "substantial service" performance requirement with "safe harbors" that would be in harmony with other mobile and fixed wireless radio services. The Commission also should recognize the operations of licensees during their existing license terms at renewal. For these licensees, the Commission should deem a licensee to have provided "substantial service" if: (a) it satisfied any "safe harbor" *at any time during the existing license term*; (b) it demonstrated "substantial service" within five years following the completion of the transition; or (c) *any* licensee on the system provided "substantial service," in order to account for the various uses of spectrum across a given market, including guardband and the need to preserve capacity for expansion.

The Commission should flatly reject Clearwire Corporation's alternative "safe harbors" and its suggestion that existing licensees that discontinue service should receive no credit at renewal time. This proposal is procedurally defective, contrary to Commission policy and fundamentally unfair to existing licensees and operators like BellSouth that invested millions of dollars to provide competitive multichannel video service, provided that service for several years, maintained service to customers during a long period of regulatory uncertainty, and continued providing service even after the Commission permitted it to discontinue service.

Second, the Commission should afford licensees a reasonable period following the Transition Period to "self-transition" their channels to the new band plan. This concept, presented by representatives of both the BRS and EBS licensees, would afford licensees an opportunity to relocate to the new band plan in markets where no transition proponent steps forward. The Commission also should declare that lessors of BRS and EBS spectrum cannot exchange their licenses for auction bidding credits unless the lease specifically permits.

Third, the Commission should retain the four-channel limit for EBS licensees in an area of operation, but permit EBS licensees to acquire co-channel spectrum in the surrounding "white area" in order to expand service in the market. Preservation of the rule will help foster the Commission's goals of providing as many educators as possible with the opportunity to access spectrum to meet their educational mission. This objective will gain, not lose, importance as the range of wireless services expands.

Fourth, the Commission should auction available BRS and EBS spectrum according to channel group, as urged by BellSouth and others in their Comments. The Commission should reject the proposal of one commenter that would prohibit commercial entities from providing financial support to bidders in an EBS auction. Such a restriction would contravene the Commission's policies and would be impossible to govern.

Fifth, the Commission should adopt rules that protect land-based BRS and EBS licensees from receiving harmful interference caused by BRS operations in the Gulf of Mexico, as urged by BellSouth and other coastal BRS operators. Because there is no

educational institution located in the Gulf, there is no established basis for the Commission to auction EBS spectrum in the Gulf.

Finally, the Commission should adopt a regulatory fee formula that is based on MHz/pop, if GSAs and population figures are clearly defined. If not, the Commission should retain the current call sign system for regulatory fees.

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BellSouth Corporation and its wholly-owned subsidiaries BellSouth Wireless Cable, Inc. and South Florida Television, Inc. (collectively, "BellSouth") submit these Reply Comments in the above-captioned proceeding.[1] BellSouth addresses a variety of

[1] *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-135, 19 FCC Rcd 14165 (2004). References to the Report and Order portion of that document will be defined as

issues that attracted significant public input, including those issues that BellSouth discussed in its Comments in this proceeding.[2] BellSouth believes the Commission should:

- Adopt a "substantial service" performance requirement with "safe harbors" that:
  - would be in harmony with other mobile and fixed wireless radio services,
  - would recognize the operations of licensees during their existing license terms at renewal, and
  - would reject any proposal that would change the "substantial service" standard to the detriment of existing licensees.

- Afford licensees a reasonable period following the Transition Period to "self-transition" their channels to the new band plan, and declare that lessors of BRS and EBS spectrum cannot exchange their licenses for auction bidding credits unless the lease specifically permits.

- Retain the four-channel limit for EBS licensees in an area of operation, but permit an EBS licensee to acquire co-channel spectrum in the "white area" surrounding its Geographic Service Area ("GSA") in order to expand service in the market.

- Auction available BRS and EBS spectrum according to channel group and reject efforts to prohibit commercial entities from providing financial support to bidders in an EBS auction.

- Adopt rules that protect land-based BRS and EBS licensees from receiving harmful interference caused by BRS operations in the Gulf of Mexico, as urged by BellSouth and other coastal BRS operators, and reject a proposal to auction EBS spectrum in the Gulf.

- Adopt MHz/pop as the basis for calculating BRS regulatory fees, if GSAs and population figures are clearly defined, and retain the current call sign system if they cannot.

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the "*BRS/EBS Order*." References to the Further Notice of Proposed Rule Making portion of that document will be defined as the "*FNPRM*." By *Order*, FCC 04-258, released October 29, 2004, the Commission modified the Report and Order ("*Order*") to establish transitional technical rules and clarify certain non-technical rules.

[2] *See* Comments of BellSouth Corporation, BellSouth Wireless Cable, Inc. and South Florida Television, Inc. filed January 10, 2005 ("BellSouth Comments").

Discussion

I. THE COMMISSION SHOULD ADOPT A "SUBSTANTIAL SERVICE" PERFORMANCE STANDARD WITH TRADITIONAL "SAFE HARBORS" AND SPECIAL RULES FOR EXISTING LICENSES.

A. The Comments Overwhelmingly Support Adoption of "Substantial Service," the "Safe Harbors" Used for Other Wireless Services and Special Rules to Accommodate the Unique Circumstances of Existing Licenses.

BellSouth[3] and every commenter addressing the issue supported the Commission's tentative conclusion[4] to adopt a "substantial service" performance requirement, defined in Section 27.14(a) of the Commission's Rules as "service which is sound, favorable and substantially above a level of service which just might minimally warrant renewal."[5] The Commission should apply this standard to BRS and EBS services.

There also was widespread support for adoption of the "safe harbors" used for other fixed and mobile wireless services.[6] As described in the BellSouth Comments,[7] BRS and EBS licenses would be renewed if the licensees demonstrated at least one of the following:

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[3] *See* BellSouth Comments at 4.
[4] *See FNPRM* at ¶¶321, 328.
[5] *See, e.g.*, Comments of the Wireless Communications Association International, Inc. filed January 10, 2005 ("WCA Comments") at 2-5; Comments of Sprint Corporation filed January 10, 2005 ("Sprint Comments") at 7; Comments of Nextel Communications filed January 10, 2005 ("Nextel Comments") at 2; Comments of Digital Broadcast Corporation filed January 10, 2005 ("DBC Comments") at 2; Comments of Grand Wireless Company, Inc. – Michigan filed January 10, 2005 ("Grand Wireless Comments") at 1; Comments of Cheboygan-Otsego-Presque Isle Educational Service District and PACE Telecommunications Consortium filed January 10, 2005 ("COPIES/PACE Comments") at 2; Comments of C&W Enterprises, Inc. filed January 10, 2005 ("C&W Comments") at 2; Comments of SpeedNet, L.L.C. filed January 10, 2005 ("SpeedNet Comments") at 2; Comments of Wireless Direct Broadcast System filed January 10, 2005 ("WDBS Comments") at 2.
[6] *See, e.g.*, WCA Comments at 8-9; Sprint Comments at 7-8; COPIES/PACE Comments at 2; C&W Comments at 2; SpeedNet Comments at 2; WDBS Comments at 2.
[7] *See* Summary of BellSouth Comments at i-ii.

- Construction of four permanent links per one million people for licensees providing fixed point-to-point services.

- Coverage of at least 20 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services.

- Provision of specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers.

- Service to niche markets or areas outside the areas served by other licensees.

- Service to "rural areas" and areas with limited access to telecommunications services. For mobile wireless services, "substantial service" would be met if the licensee "provides coverage to at least 75 percent of the geographic area of at least 20 percent of the 'rural areas' within its licensed area."[8] For fixed wireless services, "substantial service" would be met if the licensee "constructs at least one end of a permanent link in at least 20 percent of the number of 'rural areas' within its licensed area."[9]

- Demonstration of other public interest reasons.

These "safe harbors" are used in the vast majority of wireless services and have been adopted for every new flexible-use wireless service since 1997.[10]

These "safe harbors" can and should be applied to both BRS and EBS. In their Joint Comments, the Catholic Television Network and the National ITFS Association ("CTN/NIA") agree that the "generally applicable safe harbors" for wireless services

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[8] This definition also should apply to point-to-multipoint services.

[9] This "safe harbor" incorporates and quotes the "baseline" definition recently adopted in the *Rural Order*. *See* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, Report and Order and Further Notice of Proposed Rule Making, 19 FCC Rcd 19078 (2004) ("*Rural Order*"). Although it agreed that the Commission should adopt a "safe harbor" for licensees serving "rural areas," Gila River Telecommunications, Inc. ("GRTI") proposed to "re-size" the 75 percent coverage requirement to 50 percent. Comments of Gila River Telecommunications, Inc. filed January 10, 2005 ("GRTI Comments") at 4. BellSouth does not object to adoption of this standard for "rural areas" or for tribal lands such as those GRTI serves. Because the FCC now has a definition of "rural area," it does not make sense to use the more restrictive definition used by the Rural Utilities Service, as suggested by Grand Wireless. *See* Grand Wireless Comments at 2.

[10] *See* BellSouth Comments at 4 & n.14. The Independent MMDS Licensee Coalition ("IMLC") proposed four "touchstones" for renewal expectancy. *See* Comments of the Independent MMDS Licensee Coalition filed January 10, 2005 ("IMLC Comments") at 7. At least two of these differ from the "safe harbors" identified above. BellSouth does not object to the Commission's adoption of the IMLC "touchstones" so long as it also adopts the traditional Part 27 "safe harbors" discussed in the BellSouth Comments.

should apply to EBS, and they ask the Commission to acknowledge as "safe harbors" two additional benchmarks that recognize the educational nature of the service and the benefits of leasing EBS capacity for commercial use.[11] BellSouth supports this additional flexibility for EBS.[12]

BellSouth and a number of commenters also proposed special "substantial service" rules for existing licensees. First, the Commission should deem a licensee to have provided "substantial service" if it satisfied any "safe harbor" at any time during the existing license term.[13] This would take into account "the service history of licensees prior to the adoption of the *BRS/EBS Order*, even if they subsequently discontinued service."[14] Moreover, as stated by WCA, "[t]he Commission's goals thus will be compromised if the next BRS/EBS renewals are based solely on a 'snapshot' taken when those renewal applications are filed."[15] Indeed, as the Commission itself correctly noted, after a long period of regulatory uncertainty, it is in the public interest that licensees discontinue "obsolete" services in order to transition to the new band plan.[16] Quite simply, adopting a rule that fails to account for service at any time during the license term would be inconsistent with that finding.[17]

Second, a consensus of commenters agreed that a licensee should have additional time following the end of the transition period to demonstrate "substantial service" if it

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[11] Joint Comments of CTN/NIA filed January 10, 2005 ("CTN/NIA Comments") at 8. The specific EBS "safe harbors" recommended by CTN/NIA are described in detail at page 9 of the CTN/NIA Comments.
[12] The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED") also urges adoption of the two EBS "safe harbors" proposed by CTN/NIA. *See* Comments of IMWED filed January 10, 2005 ("IMWED Comments") at 7. However, IMWED claims that the "common wireless performance requirements . . . are inapposite for EBS." IMWED Comments at 6. To the extent that IMWED's proposal can be construed to mean that the traditional "safe harbors" should not apply to EBS, BellSouth disagrees with this position.
[13] *See* BellSouth Comments at 11; WCA Comments at 13.
[14] BellSouth Comments at 11.
[15] WCA Comments at 10.
[16] *See BRS/EBS Order* at ¶¶232-233.
[17] *See* discussion at Part I.B., *infra*.

has not otherwise met the standard. Long-time BRS/EBS operators such as BellSouth[18] and Sprint[19] – joined by the two trade associations representing BRS and EBS licensees and operators[20] – specifically urged that, in cases where a BRS or EBS license term would expire within five years following the completion of the transition, the licensee should obtain renewal of its license conditioned upon demonstrating "substantial service" within five years from the post-transition notification date applicable to such licensee in its specific market. This would afford every licensee the same period of time following its transition – five years – to demonstrate "substantial service," to the extent it cannot demonstrate "substantial service" prior to such time.

A few commenters supported this concept, but offered variations on the deadline for demonstrating "substantial service." For instance, Hispanic Information and Telecommunications Network ("HITN") proposed that licenses subject to renewal before January 2015 be granted a short term renewal until that date on the basis that it will take five years to complete the transition and another five years to meet a "safe harbor."[21] In cases where a transition occurs sooner, a licensee could have nearly ten years to show "substantial service." In other markets where a transition occurs later, a licensee will have less time. BellSouth's proposal to grant licensees five years from the end of the transition to provide "substantial service" is more responsive to the timing of a transition in a specific market, affords each licensee the same post-transition compliance period, and thus could be more fairly applied.

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[18] *See* BellSouth Comments at 13-14.
[19] *See* Sprint Comments at 10.
[20] *See* WCA Comments at 14-16; CTN/NIA Comments at 8.
[21] *See* Comments of Hispanic Information and Telecommunications Network filed January 10, 2005 ("HITN Comments") at 3.

BellSouth disagrees with the position advanced by Clearwire Corporation ("Clearwire") to require a licensee to demonstrate "substantial service" within five years after the effective date of the new rules.[22] This proposed deadline would not afford a licensee sufficient time following a transition to meet the "safe harbors" – especially the more stringent "safe harbors" Clearwire recommends.[23] Further, as is the case with HITN's proposal, this time frame is triggered by adoption of the rules rather than the end of the transition period, and thus would unfairly apply different time periods following the transition for licensees to comply.

BellSouth also disagrees with Digital Broadcast Corporation, which asks the Commission to require a licensee to forfeit its MBS channel if that channel is not "place[d] in operation" by January 10, 2010, five years after the effective date of the rules adopted in the *BRS/EBS Order*.[24] Given that the BRS authorization will include both LBS/UBS channels and an MBS channel, it does not make sense to have a different "substantial service" deadline for each. Moreover, some transitions may require installation of digital equipment for MBS channels, which can take a significant time to install and make ready for service.

Third, BellSouth,[25] other large system operators[26] and WCA[27] advocated a finding of "substantial service" where any licensee on the system provided "substantial service." This would acknowledge several realities:

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[22] *See* Comments of Clearwire Corporation filed January 10, 2005 ("Clearwire Comments") at 9.
[23] *See* discussion at Part I.B., *infra*.
[24] DBC Comments at 2.
[25] *See* BellSouth Comments at 14-15.
[26] *See* Nextel Comments at 4; Sprint Comments at 8-9. The Nextel Comments and Sprint Comments both refer to a "multi-channel system." From context, BellSouth believes Nextel and Sprint mean "multi-license system" in light of the fact that most licenses cover more than one channel and some H-channel authorizations may cover only one channel.
[27] *See* WCA Comments at 11-13.

- "operators are likely to utilize BRS and EBS channels from various sources within a given market;"[28]

- "[m]easuring substantial service on a per call sign or per channel basis may also result in a finding that a licensee has not diligently deployed service when, in fact, a large number of consumers in a given geographic area have access to the service the licensee offers."[29]

- Some licensed spectrum may be used as "guardband to shield other BRS and EBS licensees on the system from interference."[30]

- An operator may not have a "current use" for all channels and may desire to set aside spectrum for future growth.[31]

These examples illustrate that the Commission should review "substantial service" on a market-wide basis rather than simply looking at the services provided by a single licensee.

Similarly, one of the "safe harbors" for EBS proposed by CTN/NIA would recognize "substantial service" where a licensee leases its spectrum for commercial services that qualify as "substantial service," even where the EBS channels are reserved for other purposes at renewal.[32] This proposal is consistent with rules permitting educational programming to be shifted to other channels on the system and the Commission should adopt it.[33]

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[28] Sprint Comments at 8-9.
[29] Nextel Comments at 5.
[30] BellSouth Comments at 14. *See also* WCA Comments at 11-12.
[31] BellSouth Comments at 14. *See also* WCA Comments at 12-13.
[32] *See* CTN/NIA Comments at 9.
[33] *See* Section 27.1214(a)(3). *See also* Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service, MM Docket 93-106, *Report and Order,* 9 FCC Rcd 3360 (1994).

B. The Commission Must Reject the Lone Opposition Plan to the Consensus "Substantial Service" Proposals.

Only Clearwire proposes a radically different "substantial service" scheme. This approach is contrary to Commission policy and it fails to take into account the realities of spectrum use. Clearwire's proposal would deny a licensee recognition of its provision of service in the past if it discontinues service following the Commission's decision to permit service disruption to facilitate the transition. Clearwire's proposal would effectively overturn the Commission's earlier decision and should be rejected out of hand.

Although it supports adoption of a "substantial service" standard generally, Clearwire proposes the following standard:

> Within five years of the effective date of the [*BRS/EBS Order*], each authorization holder must construct EBS or BRS stations on each channel group subject to authorization that will provide signals that are capable of providing reliable broadband service to two-thirds of the population in the geographic service area.[34]

Clearwire argues that the "safe harbors" for construction of four permanent links and coverage to 20 percent of the population "are too lenient and will not facilitate the rapid transition and deployment in the band."[35] Instead, Clearwire asked the Commission to reinstate the build-out requirements of former Section 21.930 which requires a licensee to demonstrate coverage to two-thirds of the population of the service area on grounds that if such coverage "was achievable under the former regulatory regime, then it should be

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[34] Clearwire Comments at 18.
[35] *Id.* at 15.

achievable under the new regulatory regime."[36] Clearwire goes even further and suggests that the "signal must be of a quality that can provide reliable *broadband* service."[37]

In addition to the simple inequity of Clearwire's proposal mentioned above, there are several serious problems with this scheme. First, as discussed *supra*, the proposed compliance deadline would afford licensees disproportionate periods of time after the transition to demonstrate "substantial service." The Commission should adopt an approach that is more in tune with how the transition will likely unfold and therefore should set the deadline at a date occurring after the transition period has ended to avoid situations where a willing but later-transitioning licensee has less time to provide "substantial service."

Second, Clearwire's plan ignores the probability that BRS and EBS channels may be used as guardband or held in reserve for future expansion. A number of other commenters – including long-time BRS/EBS operators – demonstrated that there are public interest benefits of allowing a licensee to meet a "substantial service" test even if its channels are being reserved for future capacity needs or guard-band to support the market-wide system.[38]

Third, Clearwire's proposal to require all licensees to provide "reliable broadband service" suffers from two fatal flaws – it makes no attempt to define "reliable," and it would require licensees to offer "broadband" service.[39] In fact, some licensees may wish

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[36] *Id.*
[37] *Id.* at 17 (emphasis added).
[38] *See* Part I.A., *supra*.
[39] Clearwire also proposes that BRS incumbent licensees (but not BTA authorization holders) "should only be afforded bidding credits for their spectrum if they actually deployed wireless broadband service in the GSA, but failed to meet the substantial service standard." Clearwire Comments at 9, n.15. Aside from the novel requirement that licensees must provide "broadband" service, Clearwire's proposal would require Commission staff to engage in dangerous line-drawing to determine the difference between "substantial service" and "service that is not substantial." "Safe harbors" are designed to avoid this very problem.

to provide narrowband services, video services[40] or other services that are not yet defined or imagined.

Fourth, Clearwire's proposed reinstatement of the two-thirds coverage requirement cannot be casually presented as a "good enough then, good enough now" standard. The Commission should reject this standard as it would contravene the "substantial service" and "safe harbor" definitions established for every wireless service over the past eight years following adoption of Section 21.930 in 1995, and would plainly ignore the complexities of the transition. Indeed, when the Commission adopted that rule, the MDS service was a mass media service for which, perhaps, a two-thirds coverage standard might have been appropriate. That is not the case now. Moreover, following the suspension of Section 21.930 in April 2003 for holders of BTA authorizations[41] and the absence of any substitute standard, it would have been reasonable for a BRS licensee to cease its efforts to meet the two-thirds coverage requirement at that time.

Fifth, the ITFS service had no such coverage requirement because it was not conceived as a commercial-like service predicated on coverage. Application of this standard to EBS thus would be unfair.

Only Clearwire argues that a licensee should not receive any benefit from prior service unless it complied with former Section 21.930, continued providing "valuable" service and met the "substantial service" requirement five years after the effective date of

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Moreover, it is not clear why, under Clearwire's plan, incumbent BRS licensees should be treated differently from holders of BTA authorizations.

[40] This would be especially true for a licensee that "opts out" of a transition, a possibility Clearwire neglects to mention.

[41] *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rule Making and Memorandum Opinion and Order*, FCC 03-56, 18 FCC Rcd 6722, 6805 (2003).

the new rules.[42] Under this proposal, any licensee that took advantage of the Commission's decision to discontinue service as part of the transition would face that precise and draconian consequence the Commission said it would not impose – loss of its license.[43] In effect, Clearwire is asking the Commission to reconsider its decision to permit licensees to discontinue their obsolete service, but yet it has not filed a petition for reconsideration seeking reversal.[44] Therefore, the Commission should reject Clearwire's proposal on this basis alone.

If it nevertheless considers Clearwire's argument, the Commission should reject it because it has an absurd result. It would deny licensees like BellSouth of the credit they rightfully earned for investing millions of dollars to provide competitive multichannel video service to customers, for actually providing that service for several years through a long period of regulatory uncertainty, and continuing to provide that service even after the Commission permitted it to discontinue service and then only ceasing to provide service to transition its systems. It would be arbitrary and capricious to provide that any licensee that previously provided service and, in compliance with the Commission's rules, discontinued service as part of the transition process might have its license revoked if it did not reinstate service prior to expiration of its license.

II. THE COMMISSION SHOULD PERMIT LICENSEES TO "SELF-TRANSITION" TO THE NEW BAND PLAN.

Several commenters proposed a process by which BRS and EBS licensees could "self-transition" their spectrum to the new band plan prior to any auction of

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[42] *See* Clearwire Comments at 18. Clearwire offers no definition for the inherently subjective term "valuable."

[43] Section 27.1234 specifically permits licensees to discontinue service during the transition.

[44] Clearwire's Petition for Partial Reconsideration filed January 10, 2005 addresses only the cost-sharing mechanism for transition-related costs.

"untransitioned" spectrum the Commission might hold.[45] BellSouth supports the right of licensees to self-transition along the following lines.

First, as WCA recommended, a licensee that is not subject to an Initiation Plan should have the right to self-transition its channels to the new band plan.[46] This would provide licensees with a final, one-time opportunity to transition. It would be useful in cases where, for instance, a commercial operator lacks funds for a market-wide transition and its spectrum lessor desires to cover the costs to transition its own channels.[47]

Second, a licensee must have a fair opportunity after the conclusion of the transition period to make a determination about its spectrum. Under the self-transition option, a licensee should sufficient time to complete the transition and notify the Commission.[48] This time will be needed to engineer the channels, purchase any new equipment that may be required, complete construction and initiate service to the public. Sprint's proposal to require the self-transition to be completed in just 60 days is not a reasonable period of time, especially in light of the time and complications that may be necessary to install digital video equipment for transmitting MBS channels.[49]

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[45] *See, e.g.*, CTN/NIA Comments at 17-18; WCA Comments at 18-19; Sprint Comments at 4-5; Nextel Comments at 5; Clearwire Comments at 8. The self-transitioning proposal also is discussed in various petitions for reconsideration filed in this proceeding. BellSouth thus reserves the right to provide further input in pleadings responsive to such petitions.

[46] *See* WCA Comments at 19. BellSouth adds that this process should be available to any licensee that has "opted out" of a transition. Of course, a licensee that has "opted out" of a transition also would retain the right to keep its spectrum under the "old" band plan and would not have to exchange any of its spectrum for bidding credits or reimbursement costs.

[47] Once the election is made, the Commission should issue a public notice identifying the choice each licensee has made. In light of the fact that there would be no transition proponent or other stations involved, it will not be necessary to apply the more detailed procedures of Section 27.1231(d) in these circumstances, as some commenters suggested. *See* COPIES/PACE Comments at 4; C&W Comments at 4; SpeedNet Comments at 4; WDBS Comments at 4; DBC Comments at 4.

[48] Blooston, Mordkofsky, Dickens, Duffy & Prendergast ("Blooston") suggests that licensees that desire to self-transition would do so by filing applications with the Commission following frequency coordination. *See* Comments of Blooston filed January 10, 2005 ("Blooston Comments") at 3. BellSouth submits that applications would not be necessary to effectuate self-transitioning.

[49] *See* Nextel Comments at 6 (suggesting "reasonable time" for licensees to self-transition); COPIES/PACE Comments at 3 (proposing one-year self-transition period); C&W Comments at 3 (same); SpeedNet

The Commission should adopt a safeguard that would prevent a BRS or EBS licensee that leases its spectrum from exchanging its spectrum – or any portion of it – for bidding credits in the absence of any specific right from the spectrum lessee.[50] As Sprint correctly observed, the spectrum exchange procedures should not be twisted into a process in which a licensee can "void or circumvent any obligations [it] may have under existing spectrum leases with BRS/EBS lessees."[51] By making this clear, and without itself interpreting the provisions of private lease agreements, the Commission will, as a matter of policy, preempt disputes that could arise over the rights of lessors to inappropriately convert their spectrum into bidding credits that would be meaningless to the lessee.

III. THE COMMISSION SHOULD PRESERVE THE FOUR-CHANNEL LIMIT FOR EBS LICENSEES, EXCEPT IN CASES WHERE THE LICENSEE SEEKS TO ACQUIRE CO-CHANNEL SPECTRUM IN THE SURROUNDING "WHITE AREA."

The Commission asked whether it should retain Section 27.5(i)(3) that limits EBS licensees to four channels in a single area of operation.[52] Several commenters asked the Commission to abolish this rule, generally arguing that the limitation is inconsistent with the Commission's goal to provide EBS licensees with more flexibility.[53]

Comments at 3 (same); WDBS Comments at 3 (same); DBC Comments at 3 (same). Although it is not specific, WCA proposes a period of less than 18 months, but acknowledges the need of self-transitioning licensees to have "a fair opportunity to address the logistical issues associated with a self-transition." WCA Comments at 19.

[50] *See* Sprint Comments at 5; Nextel Comments at 7; WCA Comments at 22-23.

[51] Sprint Comments at 5.

[52] *See FNPRM* at ¶¶344-346. Section 74.902(a)(1) defines "area of operation" as "the area 35 miles or less from the ITFS main station transmitter." *See* Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, 13 FCC Rcd 19112 (1998) at Appendix C.

[53] *See, e.g.*, CTN/NIA Comments at 18; COPIES/PACE Comments at 5; Clearwire Comments at 7; HITN Comments at 9; IMWED Comments at 13.

BellSouth urges the Commission to retain the restriction. As the Commission observed, the four-channel limitation has been a useful way "to provide as many educators as possible with the opportunity to operate ITFS systems that meet their educational needs."[54] This objective will be more important as the range of services available on EBS spectrum expands – educators may have entirely different service goals.

However, the four-channel limit should not apply where an EBS licensee with a GSA desires to acquire co-channel spectrum in the surrounding "white area." In this case, an existing licensee in a GSA should be able to acquire co-channel spectrum at auction or in the secondary market in order to expand its service to more closely match the BRS service area for the market. These circumstances would arise where, for instance, an EBS licensee already is licensed on more than four channels in a GSA and wants to acquire the same spectrum in the surrounding "white area." Also, where a "main station transmitter" or base station is located within the same "area of operation" as the surrounding "white area," the existing EBS licensee should not be prohibited from acquiring a co-channel license in such area.

IV. THE COMMISSION SHOULD AUCTION SPECTRUM BY FREQUENCY BLOCK.

BellSouth urged the Commission to auction each frequency block separately, "in order to afford bidders the opportunity to acquire the appropriate amount of spectrum on the 'best' available channels, without having to acquire spectrum it does not desire."[55]

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[54] *FNPRM* at ¶346. *See also* Comments of NY3G Partnership filed January 10, 2005 at 21.

[55] BellSouth Comments at 15. Similarly, BellSouth supports auctioning the H-channels as a block (where more than one channel is available). Where possible, the BRS-1 and BRS-2 channels should be auctioned as a pair to simplify the auction process.

Several other commenters echoed this view, including CTN/NIA,[56] Clearwire,[57] IMWED[58] and Nextel.[59] No commenter proposed to separately auction all of the LBS and UBS spectrum as a block.

Several commenters proposed to auction the MBS channel separately from the LBS and UBS frequency blocks (*i.e.*, Channels A1-A3 would be auctioned separately from Channel A4).[60] Others suggested that the Commission auction EBS channels in the "traditional" four-channel blocks.[61] BellSouth believes that either method would be appropriate.

BellSouth strongly opposes IMWED's renewed proposal that would prohibit EBS auction bidders from receiving financial support from commercial operators,[62] and strongly opposes other proposals that would provide EBS auction participants with discounts if they have not agreed to lease spectrum to a commercial entity.[63] First, the Commission has long recognized the benefits of EBS leasing and the important role commercial entities have in making spectrum accessible to the public and in promoting educational use.[64] Belated proposals to restrict or discourage commercial support would

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[56] *See* CTN/NIA Comments at 14 (stating that incumbents could "secure rights to their desired current channels in a larger area, without having to purchase spectrum they are not interested in utilizing").
[57] *See* Clearwire Comments at 11 ("spectrum auctions on a channel group basis . . . will help promote competition").
[58] *See* IMWED Comments at 9.
[59] *See* Nextel Comments at 9 (noting value of contiguous spectrum over single channels). *See also* COPIES/PACE Comments at 3; C&W Comments at 3; SpeedNet Comments at 3; WDBS Comments at 3; DBC Comments at 3.
[60] CTN/NIA Comments at 13-14; WCA Comments at 25; Nextel Comments at 9.
[61] HITN Comments at 6; COPIES/PACE Comments at 3; C&W Comments at 3; SpeedNet Comments at 3; WDBS Comments at 3; DBC Comments at 3.
[62] *See* IMWED Comments at 9-11. As discussed in the Reply Comments of WCA, NIA and CTN filed October 23, 2003 ("Coalition Reply Comments"), IMWED has pleaded its case before, to no avail. *See* Coalition Reply Comments at 87-90.
[63] *See* COPIES/PACE Comments at 2; C&W Comments at 2; SpeedNet Comments at 2; WDBS Comments at 2; DBC Comments at 2. SpeedNet and DBC suggest that the amount of the discount should be 50% or more.
[64] *See* Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service,

have a chilling effect on the ability of EBS-eligibles to enter into relationships that benefit the educator. Second, these proposed solutions would be impossible to police. Educational institutions receive grants and other forms of support from commercial entities all the time. In fact, the proposed restrictions could have the countervailing effect of restricting the amount of funding that educators receive, to the widespread detriment of the community at large.

Third, the Commission's auction policies encourage large companies to invest in small businesses and entrepreneurs, consistent with real party-in-interest and equity restrictions.[65] The Commission should not restrict commercial funding of EBS auction bids or discourage such investment. Rather, it should encourage the benefits that come to educational institutions from this private investment.

V. THE COMMISSION SHOULD ADOPT TECHNICAL AND SERVICE RULES FOR THE GULF OF MEXICO THAT FULLY PROTECT INCUMBENT LAND-BASED BRS AND EBS OPERATIONS.

BellSouth,[66] Sprint,[67] Nextel[68] and WCA[69] addressed the issue of technical rules for BRS operations in the Gulf of Mexico, agreeing that the Commission should:

- Actively establish the boundaries of the Gulf Service Area and technical rules that protect incumbent operations.[70]

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and the Private Operational Fixed Microwave Service, Gen. Docket No. 80-112 and CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1203 (1983); Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, MM Docket No. 83-523, *Second Report and Order*, 101 FCC 2d 50 (1985); Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Two-Way Transmissions, *Report and Order*, 13 FCC Rcd 19112 (1998).

[65] *See* Section 309(j)(4)(D) of the Communications Act of 1934, as amended. *See also* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 10 CR 999 (1998).

[66] *See* BellSouth Comments at 16-18.

[67] *See* Sprint Comments at 10-11.

[68] *See* Nextel Comments at 12-13.

[69] *See* WCA Comments at 33-43.

[70] *See* BellSouth Comments at 16; WCA Comments at 35.

- Grandfather the GSA of any land-based BRS and EBS station, including those areas that extend into the Gulf of Mexico.[71]

- Adopt the same boundary definitions that it adopted in establishing the WCS service, *i.e.*, 12 nautical miles from the coastline.[72] In cases where the BTA boundary does not extend to the 12-mile distance the Commission should establish a "Gulf Coastal Zone" between the BTA boundary and the Gulf Service Area boundary that could be served by both the adjacent land-based BTA licensee as well as any Gulf Service Area licensee the Commission may authorize, subject to applicable interference protection standards.[73]

No party opposed these recommendations, and the Commission should therefore adopt them.

The Commission proposed to exclude all ITFS channels from licensing in the Gulf because "ITFS licensees had not expressed interest in seeking licenses to operate in the Gulf of Mexico, the area most likely had little need for educational service and the requested commercial use did not require the full bandwidth available in the 2500-2690 MHz band."[74] HITN supported licensing of EBS frequencies in the Gulf so long as "coastal EBS licensees are not prejudiced by the introduction of such new authorizations."[75] But, it proposes a Gulf of Mexico service area boundary for EBS located 35 miles from the coastline, with areas inside that boundary deemed "white space" and subject to auction.

HITN has failed to justify a need for EBS licensing in the Gulf of Mexico. First, there are no educational institutions located in the Gulf of Mexico. Second, there is no demonstrable need for educational service in the Gulf of Mexico. Third, there is no

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[71] *See* BellSouth Comments at 17; Sprint Comments at 11; Nextel Comments at 13; WCA Comments at 39-40.
[72] *See* BellSouth Comments at 17; Sprint Comments at 11; Nextel Comments at 13; WCA Comments at 40-41.
[73] *See* BellSouth Comments at 17-18; WCA comments at 41-42.
[74] *FNPRM* at ¶362.
[75] HITN Comments at 11. Presumably, HITN would not want EBS facilities to cause interference to BRS stations either.

reason why other spectrum, such as BRS or satellite, could not serve such a need if it were to arise in the future. Without responding to these threshold issues, the Commission should not make EBS spectrum available in the Gulf of Mexico.

VI. BRS REGULATORY FEES SHOULD BE CALCULATED ON A MHz/POP BASIS.

BellSouth endorses the position taken by Nextel and WCA recommending a MHz/pop formula to calculate BRS regulatory fees,[76] to the extent the Commission clarifies how GSA boundaries will be determined[77] and establishes common measurements for determining the relevant population.[78] If the Commission cannot provide such certainty, it should retain the system currently in place which is based on a fixed fee for each call sign.

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[76] *See* Nextel Comments at 11-12; WCA Comments at 32-33.

[77] Nextel's Petition for Partial Reconsideration notes that the rules adopted in the *BRS/EBS Order* do not specify a means for dividing more than two overlapping GSAs, do not account for curvature of the Earth and do not specify how cancelled, forfeited, reinstated and pending licensees affect the GSA boundary. *See* Nextel Petition for Partial Reconsideration filed January 10, 2005 at 19-20.

[78] Both Nextel and WCA recommend using 2000 U.S. Census data to calculate population.

Conclusion

The Commission should amend its rules as set forth in BellSouth's Comments and these Reply Comments in this proceeding and should reject the proposals of other commenters to the extent discussed above.

Respectfully submitted,

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